Supreme Court, U. S.
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In The

Supreme Court of the United States

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Action No. 76-1288

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R. J. WITTENBRINK and NANCY McCOY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF COLORADO, by and on behalf of THE PEOPLE OF THE CITY OF THORNTON,

Respondents.

—o—

RESPONSE IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

—o—

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—o—

Respondents pray that a Writ of Certiorari be denied to review the judgment of the Supreme Court of the State of Colorado entered on November 22, 1976.

—o—

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado in this case is reported at 556 P. 2d 1217 and is set out in the Appendix of the Petition for Writ of Certiorari of the Petitioners at page 7.

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JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on November 22, 1976, with the petition for rehearing being denied on December 27, 1976. The Petitioners are invoking the jurisdiction of this Court under 28 U. S. C. 1257 (3), wherein the validity of Section 6-2 of the Home Rule Charter of the City of Thornton, Colorado, is drawn in question on the grounds of its being repugnant to the Constitution of the United States.

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STATUTORY PROVISIONS INVOLVED

Section 6-2, City Charter of the City of Thornton, Colorado,

> "The Municipal Court shall be presided over and the functions exercised by one or more judges, who are qualified electors of the State of Colorado and who are at least twenty-five (25) years of age, appointed by the Council to serve at the pleasure of the Council."

Section 13-10-103, C. R. S. 1973, Volume 6, page 81 (Municipal Courts)

> "This article shall apply to and govern the operation of municipal courts in the cities and towns of this state. Except for the provisions relating to the method of salary payment for municipal judges, the right to a jury trial for petty offenses provided for in section 16-10-109, C. R. S. 1973, rules of procedure promulgated by the Supreme Court, and appellate procedure, this article may be superceded by charter or ordinance enacted by a home rule city."

Section 13-10-105, C. R. S. 1973, Volume 6, Pages 81 and 82 (Municipal Judges)

> "Unless otherwise provided in the charter of a home rule city, a municipal court shall be presided over by a municipal judge who shall be appointed by the municipal governing body for a specified term of not less than two years. . . ."

Section 31-4-208, C. R. S. 1973, as amended, 1975 Cumulative Supplement, page 32 (Municipal Government)

> "The city council shall appoint a city attorney who upon taking office, shall be an attorney at law licensed to practice in the State of Colorado. The city council shall also appoint a municipal judge. Said officers shall serve at the pleasure of the city council."

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QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioners denied due process of law in being tried before a municipal judge whose method of appointment and tenure was set by the City Charter of a home rule city, which method was authorized by State Statute?

2. Were Petitioners denied equal protection of the law in being tried before a municipal judge in a home rule city whose tenure status differed from judges in statutory cities and other state courts.

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STATEMENT OF THE CASE

Petitioners McCoy and Wittenbrink received summons and complaints in early 1975 for alleged traffic violations in the City of Thornton, Colorado. The City of Thornton is a home rule city. Prior to trial, motions were made by the Petitioners to dismiss the actions on the grounds that the Thornton municipal judges were not appointed to a term of two years as allegedly specified by statute and that the Petitioners were denied equal protection of the law because at the municipal level the judges did not have specific tenure and at other levels in the state court system judges did have a specified tenure. The municipal court denied the motion to dismiss and at trial the Petitioners were convicted of the charges against them.

Appeal was taken to the County Court of Adams County. The statutory appeal procedures provide for trial de novo in the county court. The motions to dismiss were raised anew in the county court. The Petitioners were assigned to Division 1 of the Adams County Court, the Honorable John Horan presiding. Another defendant represented by the same counsel was assigned to Division 4 of the Adams County Court, the Honorable Dorothy Binder presiding. Judge Horan ruled in favor of the motion to dismiss of the Petitioners at bar (Appendix C of the Petition for Writ of Certiorari), and Judge Binder ruled in favor of the Respondent City on the identical motion by the other defendant (Appendix A herein). Judge Binder's decision was not appealed. Judge Horan's decision was appealed directly to the Supreme Court of the State of Colorado by the Respondent City. The Supreme Court ordered Judge Horan to show cause why his order dismissing the cases was not abuse of his authority and beyond his jurisdiction.

The Supreme Court of the State of Colorado reversed the decision of Judge Horan. Eight members of the Supreme Court joined in the opinion of the Court and one Justice filed a dissent (Appendix A of the Petition for Writ of Certiorari).

The Petitioners filed a petition for rehearing before the Supreme Court of the State of Colorado which was denied on December 27, 1976 (Appendix B of the Petition for Writ of Certiorari). Thereafter, Petitioners filed a Petition for Writ of Certiorari with this Court.

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REASONS FOR DENYING THE WRIT

1. The Petitioners were not denied due process of law. There is no due process right for a defendant to be tried before a judge with a certain amount of tenure or subject only to removal for certain reasons of "cause".

The statutes of the State of Colorado quoted above provide the circumstances under which the Thornton municipal judges are appointed to serve at the pleasure of the

council. Title 13, Article 10, Sections 101, et seq., of the Colorado Revised Statutes of 1973 govern the operation of municipal courts in the State of Colorado. Section 13-10-103, supra, sets out the applicability of the article to municipal courts. It clearly provides that certain sections of this title cannot be changed by charter or ordinance enacted by a home rule city. One section in particular, regulating the method of payment of municipal judges, cannot be amended by city charter or ordinance. There is no language restricting the right of a home rule city to provide for tenure provisions concerning its municipal judges.

Section 13-10-105, supra, specifically provides that a charter of a home rule city can set the tenure of its municipal judge. These statutes set out guides for the operation of municipal courts and provide that certain aspects of that operation that cannot be changed by home rule charter, leaving a great number of aspects left to the discretion of the people in enacting their home rule charters. The opinion announced by the Colorado Supreme Court recognized this fact, and the Court stated:

> "The fact that the term of office for municipal judges is not included in the exceptions clearly indicates the legislatures recognition that the tenure decision lies in the hands of the citizens of home rule cities."

In its opinion the Colorado Supreme Court also relies on the recently revised Section 31-4-208 of the Colorado Revised Statutes, supra, relating to appointment of judges in statutory cities. The Court stated:

> "Finally, a recent action by the legislature has demonstrated that terms of office for judges that do not provide tenure are not against the public policy of the state. Section 31-4-208, C. R. S. 1973 (1975 Supp.), directs that municipal judges in statutory cities with a city manager form of government sit at the pleasure of the city council."

Additionally, as was noted above, Judge Binder of the Adams County Court denied an identical motion to dismiss by another defendant. Judge Binder's decision is included as Appendix "A", herein. That decision was not appealed.

The Petitioners ask this Court to "invent" a new due process right, for there is no legal doctrine, case law, nor any statute which makes it a right of a defendant to be tried before a judge with a particular tenure status. In *Palmore v. United States*, 411 U. S. 389, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973), this Court considered a constitutional challenge to the tenure status of the judges in the Superior Courts in the District of Columbia. In the opinion of the Court, Mr. Justice White stated:

> ". . . Congress may provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary. In this respect, the position of the District of Columbia defendant is similar to that of the citizen of any of the 50 States when charged with violation of a state criminal law; *Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees.*" (Emphasis added.)

In the conclusion of that opinion this Court stated:

"Palmore's trial in the Superior Court was authorized by Congress' Art. I power to legislate for the

> District in all cases whatsoever. Palmore was not more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime. Nor did his trial by a nontenured judge deprive him of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to tenure deprives them of due process of law under the Fourteenth Amendment."

The Petitioners cite *Tumey v. Ohio,* 273 U.S. 510 (1927), and *Ward v. Village of Monroeville,* 409 U.S. 389 (1972), in support of their contention that there was a denial of due process. In those cases, because the mayor of the town was also the local judge, it was ruled that his direct knowledge of the financial affairs of the city and because his income depended entirely upon the fines paid by convicted defendants, there existed a breach of due process. Judge Binder considered these cases in her decision, and in that regard stated:

> "However, in *Dugan v. Ohio,* 277 U.S. 61, 72 L.Ed. 784, also involving a mayor who acted as judge but who received a stated salary, the United States Supreme Court found no deprivation of due process. In this connection it should be noted that the Thornton City Charter provides that '(the) judge shall receive a fixed salary or compensation, not dependent upon the outcome of the matters to be decided . . .'."

In addition, we offer the following comparison between the circumstances found by the court in *Tumey v. Ohio* and the Colorado law:

PROVISIONS IN VILLAGE ORDINANCE IN *TUMEY v. OHIO*	PROVISIONS IN COLORADO LAW
1. Justices were paid only out of court fees which procedure was not authorized by the Ohio State Constitution.	1. Municipal judges' salaries limited by statute to fixed annual compensation.
2. Justices' compensation was entirely dependent upon conviction.	2. Judges' compensation not related to convictions under state statutes and under Thornton City Charter.
3. No right to a jury trial existed.	3. Right to a jury trial exists in all courts in the State system, including municipal courts.
4. Limited right of appellate review confined to questions of law only.	4. Appeal from municipal court in all cases to county court level with trial de novo.

Thus, we see the greatly increased due process protections provided by the Colorado law and the clear distinguishability between the *Tumey* case, supra, and the case at bar. The distinctions are similar in *Ward v. Village of Monroeville,* supra.

To presume that the right of due process has been abridged by the mere circumstance that a judge sits at the pleasure of the appointing body, is to presume that because of this circumstance, the judge will be improperly influenced by the appointing body. Without a legal doctrine or case law or statute to support this presumption, and without facts to show the improper influence, there is no violation of due process. We must not *assume* that judicial officers will fall prey to improper political pressures. We must

not *assume* that governing bodies will attempt to exert improper political pressure on members of the judiciary. To make that assumption without any basis in law or fact, is to presume that these public officers are inherently dishonest and it is therefore necessary to structure the law to protect the public from the inherent dishonesty of these public officials.

2. The Petitioners argue that they are not afforded equal protection of the law since the tenure status of the Thornton municipal judges differs from the tenure status of judges in other parts of the State court system. The judges in each level of the Colorado state court system have different tenure status. If we accept the Petitioners' arguments regarding tenure, then these differences themselves are violations of equal protection of the law. That argument is without merit. *Unless it can be shown* that these differences substantially affect the administration of justice, they cannot be challenged on the basis of denial of equal protection of the law. The Petitioners' argument seems to be that the less "tenure" a judge enjoys the more incentive he will have to convict defendants. The Petitioners' argument is purely speculative. It is just as likely, if likely at all, that the less tenure a judge enjoys that more cases would be dismissed.

After dismissing the Petitioners' claim of violation of due process, the Colorado Supreme Court in its opinion in this case commented upon the equal protection argument by stating:

> "Nor is respondent's equal protection claim of any validity. This court has, in the past, examined provisions which treat certain municipalities differently and has found them not to be in violation of the Equal Protection Clause. *Cf. Board of County Commissioners v. City and County of Denver,* 150 Colo. 198, 372 P. 2d 152 (1962), *appeal dismissed,* 372 U. S. 226, 83 S. Ct. 679, 9 L. Ed. 2d 714 (1963); *Francis v. County Court in and for the City and County of Denver,* 175 Colo. 308, 487 P. 2d 375 (1971). The basic inquiry is whether the difference in treatment leads to arbitrary, irrational results. There is nothing before us in this case to show that a trial before a nontenured judge in and of itself is sufficient to taint the fairness of the trial, thereby denying due process or equal protection."

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CONCLUSION

The method of appointment of Thornton municipal judges is supported by the Home Rule City Charter, which was adopted by a vote of the people, and is authorized by Colorado State Statutes and, as noted in the Colorado Supreme Court opinion, is not against the public policy of the State. No basis in fact is cited by the Petitioners, nor can one be cited, that prejudice exists because of the method of appointment and tenure of the Thornton municipal judges. The municipal court system, as embraced within the Colorado state court system, denies no defendant due process of law or equal protection of law. No substantial federal question is raised by Petitioners in their Writ of Certiorari to this Court, and Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

In the County Court in and for the County of Adams

STATE OF COLORADO

Criminal Action No. T9-3264

CITY OF THORNTON,

Plaintiff,

vs.

ORRIN W. BOWLING,

Defendant.

ORDER DENYING MOTION TO DISMISS

This cause came on the 21st day of January, 1976, for oral arguments on the defendant's motion to dismiss, Leonard McCain, Esq., representing the plaintiff and Richard Borchers, Esq., representing the defendant. The Court, having read the motion and the briefs and having heard arguments of counsel, took the matter under advisement and now denies said motion. As grounds therefore, the Court FINDS:

1. Defendant sought and was denied a writ of prohibition from the Colorado Supreme Court prior to proceeding to trial before the Thornton Municipal Court, thereby preserving grounds for the instant motion.

2. There is no dispute concerning the pertinent facts, i. e., the defendant was convicted of a traffic violation in the Municipal Court of Thornton, a home-rule city, by a lawyer-judge appointed by, and serving at the pleasure of, the City Council pursuant to the City Charter.

The defendant argues that his constitutional right to due process and equal protection of the law have been denied by virtue of the indefinite tenure of the municipal judge presiding at his trial. He claims that Thornton has failed to comply with state law in not specifying a term for municipal judges of at least two years and that the municipal court, therefore, lacked jurisdiction in this case.

The Court concludes as follows:

1. The City of Thornton has not violated state law, which clearly excepts home-rule cities from the two-year tenure requirements of other statutory cities.

The defendant cites no law to support his assertion that section 13-10-105 (1) (a), C. R. S. 1973 "allow(s) a home-rule city the power only to provide for the increased tenure of their municipal judge by charter provision." (Defendant's brief page 3). Such a contention would appear to be contrary to broad constitutional grants of power to home-rule cities (Article XX, Colorado Constitution) and to the unambiguous language of the statute cited above. The latter specifically states that "unless otherwise provided in the charter of a home-rule city" a municipal judge's term shall be not less than two years. Section 13-10-103, C. R. S. 1973 provides that Article 10 of Title 13 "may be superseded by charter or ordinance enacted by a home-rule city" except for the method of salary payment, the right to jury trial, rules of procedure promulgated by the supreme court and appellate procedure. The fact that such exceptions are listed, while the term of municipal judges is *not,* indicates a legislative intent to leave that decision to the voters of home-rule cities.

The reenactment of Title 31, C. R. S. 1973, effective July 1, 1975 affirms the power of home-rule cities to provide for alternative methods of carrying out municipal functions (Chapter 275, Section 1, p. 1006). Indeed, that statute specifies that in statutory cities with a city manager form of government the city council shall appoint a municipal judge who "shall serve at the pleasure of the city council" (Ibid. p. 1030).

The Court concludes that the charter provision in question does not violate statutory law. Even if the municipal judge was sitting illegally, however, his right to hold office may not be challenged in collateral proceedings (see 48 C. J. S. p. 958, Section 7).

2. The defendant's constitutional rights have not been violated because a nontenured judge presided in this matter.

The contentions that defendant's rights to due process and to equal protection of the law have been denied appear to rest on the assumption that a judge who serves at the pleasure of a city council is less likely than a tenured judge to be impartial. No evidence has been presented to establish a foundation for such allegation and cases cited by the defendant do not support the same. In fact, one of the cases cited by the defendant, *Palmore v. United States*, 411 U. S. 389, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973), contains language to the contrary. The defendant there asserted that he had been denied due process because he was tried before a judge in the District of Columbia who did not have lifetime tenure as provided by the United States Constitution. Since the judge in question *did* have tenure for 15 years, the following

quoted statements may well be considered dicta. They are, nonetheless, persuasive. On page 347 the court (Mr. Justice White), after stating that a defendant charged under the District of Columbia Code has a similar status to that of a criminal defendant in any of the 50 states, declares: "Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees." Further, on page 359, the court makes it clear that "the trial of the citizens of the various states for local crimes by judges without protection as to tenure (does not) deprive them of due process of law under the Fourteenth Amendment."

The defendant does not complain that he was denied a fair trial on grounds other than the indefinite tenure of the judge. This situation differs from cases cited by the defendant such as *Tumey v. Ohio*, 273 U. S. 510 and *Ward v. Village of Monroeville*, 409 U. S. 57. In both of those cases the mayor of the municipality also served as judge and his income depended upon fines paid by convicted defendants. Thus there was a pecuniary interest in the outcome in both cases. However, in *Dugan v. Ohio*, 277 U. S. 61, 72 L. Ed. 784, also involving a mayor who acted as judge but who received a stated salary, the United States Supreme Court found no deprivation of due process. In this connection it should be noted that the Thornton City Charter provides that "(the) judge shall receive a fixed salary or compensation, *not dependent upon the outcome of the matters to be decided* . . ." (Emphasis added.)

On the issue of equal protection of the law the defendant alleges that his "adjudication of guilt or inno-

cence rested merely on where the offense occurred and in which court the facts were to be tried." Implicit in this argument is the assumption that the defendant would have been acquitted had he been tried before a county judge or a municipal judge with two-year tenure. Without supporting evidence no such assumption will be indulged.

The Court having concluded that the allegations of the defendant's motion are not sustained,

IT IS ORDERED that the defendant's motion to dismiss be denied.

This matter is continued for trial to the court on May 7, 1976, at 2:00 P. M.

BY THE COURT:

Dorothy E. Binder
Judge

cc: Leonard McCain
Richard Borchers